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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re T.M., a Person Coming Under the
Juvenile Court Law.

SAN BERNARDINO COUNTY
CHILDREN AND FAMILY SERVICES,

Plaintiff and Respondent,

v.

T.M. et al.,

Defendants and Appellants.

E058657

(Super.Ct.No. J238944)

OPINION

APPEAL from the Superior Court of San Bernardino County. Cheryl C. Kersey,
Judge. Affirmed.

Grace Clark, under appointment by the Court of Appeal, for Defendant and
Appellant T.M.

Roni Keller, under appointment by the Court of Appeal, for Defendant and
Appellant J.C.

Jean-Rene Basle, County Counsel, and Danielle E. Wuchenich, Deputy County Counsel, for Plaintiff and Respondent.

Appellants T.M. (father) and J.C. (mother) have filed separate briefs regarding their son, T.M. (the child). Mother argues that the juvenile court erred in denying her an evidentiary hearing on her Welfare and Institutions Code¹ section 388 petition. Mother and father both claim that the beneficial parental relationship exception applied. (§ 366.26, subd. (c)(1)(B)(i).) We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On May 17, 2011, the San Bernardino County Children and Family Services (CFS) filed a section 300 petition on behalf of the child, who was seven months old at the time. The petition alleged that the child came within the provisions of section 300, subdivisions (a) (serious physical harm), (b) (failure to protect), and (e) (severe physical abuse of a child under five). The petition alleged that father and mother (the parents) engaged in domestic violence in the presence of the child, that father physically abused the child, and that the abuse resulted in injuries such as bruising, a torn frenulum, a skull fracture, and a broken femur. The petition also included the allegations that mother used marijuana throughout her pregnancy, that mother had a history of substance abuse, that father knew or reasonably should have known that mother had a problem with substance abuse, and that father also had a history of substance abuse.

¹ All further statutory references will be to the Welfare and Institutions Code, unless otherwise noted.

In the detention report, the social worker reported that mother had a history of domestic abuse and had previously gone to jail. Father obtained a protection order against mother in February 2011, and she had no contact with father or the child since then. Father stated that he had been the primary caretaker of the child since February 25, 2011.

On May 18, 2011, a juvenile court detained the child in confidential foster care. The court ordered separate visitation for mother and father. The court ordered supervised visitation between father and the child to be twice weekly and supervised visitation for mother to be once every other week.

Jurisdiction/Disposition

The social worker filed a jurisdiction/disposition report on June 6, 2011, and recommended that the child be removed and placed in out-of-home care and that reunification services not be provided to either parent. The child was assessed by Dr. Amy Young at the Children's Assessment Center. Dr. Young reported that the child had a skull fracture, a bruise on his left chest area, a femur fracture, and a torn frenulum (the flap of skin beneath his upper lip). The torn frenulum was consistent with blunt force. The social worker reported that father was not married to mother, and his name was not on the child's birth certificate, but he claimed to be the father. Father told the social worker that he believed the child's injuries were sustained when the child was in mother's care. He insisted that what appeared to be bruises were actually Mongolian spots.

The social worker spoke with mother as well, and she said she had not had contact with the child since February 2011.

The social worker concluded that the child had nonaccidental injuries, and that the parents were unable to provide a plausible explanation for the injuries. Due to the age of the child, his vulnerability, and his dependence on others to meet his needs, the social worker opined that his safety and well-being would be jeopardized if he remained in the parents' care.

The social worker further reported that father had not visited the child, despite the order to do so. The social worker had attempted to speak to him to schedule visitation, but was unsuccessful. Visitation with mother was ordered by the court to be twice a month, but the social worker was requesting that visitation be increased to weekly visits, in order to facilitate bonding. The first visit was scheduled, but had not occurred yet.

At a jurisdiction/disposition hearing on June 8, 2011, the court ordered weekly visitation for mother. The matter was continued.

In an addendum report dated June 20, 2011, the social worker changed her recommendation to having the parents be provided with reunification services. A CT scan of the child's skull did not provide clear findings of a fracture, and a bone survey indicated that "it [was] less likely that there [were] fractures." The social worker also noted that, on several occasions, father accused CFS staff, doctors, and other caregivers of abusing the child, but he had never acknowledged the concerns that brought the child to CFS's attention while in his care. The social worker further reported that father had a

visit on June 9, 2011, and he thought the child's bottle nipple was too big and the diaper was too small. He thus felt that the child was being neglected and abused by the foster parents, so he contacted law enforcement. At the following visit, father again contacted law enforcement when he observed a small scratch below the child's ear. Law enforcement responded both times, but found no cause for concern. The social worker opined that father appeared obsessed with inspecting the child for signs of abuse rather than actively engaging and bonding with the child.

At a contested jurisdiction/disposition hearing on December 6, 2011, the court found that the child came within section 300, subdivisions (a) and (b), declared the child a dependent of the court, declared father the presumed father of the child, and ordered the parents to participate in reunification services. The court ordered visitation for the parents to be twice a week for one hour each time, or one time a week for two hours. Mother's visits were to be unsupervised, and father's visits were to be supervised.

On March 1, 2012, the social worker informed the court that mother and father were back together as a couple.

Non-Appearence Hearing on Visitation

On March 6, 2012, CFS requested the court to find father's visits detrimental and to terminate his visitation. CFS reported that during visits, father spent a great portion of every visit arguing with staff, and he used his time to call his attorney and others to complain. At a visit on February 14, 2012, the social worker had to end the visit because the child was crying for most of it, and when a staff member made suggestions to father,

he refused to listen and made inappropriate comments. He continuously forced the child to lean backward and forward while sitting on his lap, even though the child was crying. At another visit on February 28, 2012, father had a cold and proceeded to kiss the child on the side of his lips and on his hands. When the social worker suggested that father kiss the child on the back of the head, father became defensive and argumentative. On March 27, 2012, the court suspended father's visitation pending further hearing.

A hearing was held on May 4, 2012. The court ordered father to undergo a psychological evaluation, and it ordered father's visits reinstated. The court ordered father to not have any discussions with the social workers during visits and to comply with any directions given by the social worker. The court stated that if father did not comply or called his counsel, the social worker could terminate the visit.

Six-month Status Review

The social worker filed a six-month status review report on May 29, 2012, and requested that reunification services be continued. The parents had completed objectives ordered in their case plans, in addition to completing 16 sessions of anger management. Nonetheless, they had not been able to demonstrate any benefit from the services. The social worker opined that their relationship appeared to be "toxic and not healthy for them or the child." On March 20, 2012, they had a domestic violence incident. Furthermore, the social worker reported that father had not visited the child since the court reinstated his visitation.

The social worker also reported that mother completed a substance abuse program in November 2011. Mother did not inform the social worker because she did not feel that it was her responsibility to report that information. The social worker opined that mother's and father's hostility toward CFS hindered their ability to work toward reunification. The social worker reported that when she called them to schedule visits, they were either busy or unwilling to work with the social worker's schedule. When mother did visit, she was appropriate with the child. She brought him snacks and toys and was attentive.

The social worker opined that the parents had been resistant to accept assistance from CFS from the start of the dependency case. Moreover, they still had not accepted any responsibility for the injuries sustained by the child and continued to blame everyone else for the injuries.

At a contested six-month review hearing on August 8, 2012, the court continued reunification services.

Motion to Transfer

On November 1, 2012, father filed a motion to have the case transferred to Riverside County, since he and mother had moved there. The court later denied the motion.

12-month Status Review

The social worker filed a 12-month status review report on November 5, 2012, and recommended that the court terminate reunification services and set a section 366.26

hearing. The parents were living together as a couple and stated that they intended to raise the child together. They refused to provide the social worker with their address. The social worker was concerned, given their volatile history and the recent domestic violence incident in March 2012. The social worker was also concerned because father still did not take responsibility for the child's injuries that occurred while in his care. Father remained uncooperative with completing the court-ordered psychological evaluation.

The social worker further reported that the parents were having weekly one-hour supervised visits, separately. Mother failed to show up for two consecutive visits in September 2012, without calling to cancel or reschedule. Mother's interactions during her visits were appropriate. However, the foster parent reported that after visits with mother, the child tended to engage in violent behavior, such as hitting himself in the head, hitting his head on the floor, kicking and/or hitting their dog, and throwing things. The foster parent also reported that the child became irritable immediately after visits and had trouble sleeping at night. He would wake up several times at night screaming.

As to father's visits, the social worker reported that he failed to consistently demonstrate adequate knowledge of age-appropriate behavior or proper methods of interacting with the child to promote bonding. He tended to hover over the child, instead of allowing him to explore freely. When the child showed interest in a toy, father would "bombard" him and not allow him to explore the toy on his own. The child would then get frustrated and scream, yell, hit and/or kick father. The child would go off to find

another activity until the same cycle ensued. In October 2012, the parents had a joint visit and spent the majority of the time complaining about the condition of the visitation room and the toys there, and disagreeing about what activity or toy would be appropriate for the child.

The social worker reported that mother had not completed her case plan, which included participating in general counseling, an outpatient substance abuse treatment program, and substance abuse testing. Mother was currently participating in an outpatient program at Central Valley Regional Recovery Center (Central Valley), and had been enrolled there since August 17, 2012. However, she had three unexplained absences; she tested negative on September 14, 2012, September 19, 2012, and September 27, 2012. She had previously tested positive for cocaine on July 18, 2012.

At the 12-month review hearing on November 13, 2012, the court continued the matter to December 12, 2012 for a contested review hearing.

At the outset of the hearing on December 12, 2012, county counsel pointed out that the case was at 19 months, so the hearing was in fact a section 366.22 hearing. Mother testified on her own behalf and said that the child recognized her as his mother, and that he would run to her and hug her at visits. She further testified that she had previously completed an outpatient treatment program at Central Valley, but started the program a second time on August 17, 2012, because she tested positive for cocaine in July 2012.

The social worker also testified and opined that it would not be safe for the child to return to the parents since there was evidence of mother's continued drug use, and because CFS did not know enough about father's mental status and capacity to safely parent the child. He never participated in the court-ordered psychological evaluation. As to visitation, the social worker did not sense a bond between mother and the child, since he did not seem to respond to mother any differently than he did to the caregiver or herself. Mother had been overall consistent with visitation for 19 months, but the child apparently viewed her as somebody who was taking care of him or playing with him. The social worker did not see the child seek comfort from either parent, ask to be picked up by them, or be affectionate with them.

Father testified on his own behalf and denied that he hovered over the child during visits, or that he complained about anything. He said that the child had never screamed at him during a visit.

After hearing the testimonies, the court commented that mother failed to protect the child, and then she started using drugs, had another domestic violence incident with father, and moved back in with him. The court felt that mother was now in the exact same place she was 19 months ago. As to father, the court stated that he made attempts to meet his program objectives, but never acknowledged the reason for the child's removal. The court remarked that instead of working on his program, he decided to try to manipulate the system by not complying with the orders. The court opined that the child did not feel safe during visits, and that no exceptions applied. The court concluded that

reasonable services had been provided, that the parents had failed to participate regularly and make progress in their case plans, and that their progress was insufficient. The court terminated reunification services and set a section 366.26 hearing for April 12, 2013.

Section 366.26 and Section 388

On April 3, 2013, the social worker filed a section 366.26 report recommending that parental rights be terminated and the permanent plan of adoption be implemented. The social worker reported that the child was placed in his current foster home on August 18, 2012, and that he and his foster mother had a very strong attachment. The child was happy and well cared for, and the foster mother loved him and wanted to provide him with a permanent home. She was dedicated to him and committed to raising him to adulthood.

A section 366.26 hearing was held on April 12, 2013, and the matter was set for contest by mother and father. The court continued the matter to May 6, 2013.

On April 23, 2013, father filed a section 388 petition requesting the court to terminate jurisdiction. He alleged that there was a new judge who was racist and attacked him because he was a Muslim. He alleged that the judge made derogatory statements that violated his civil rights, his “[p]arental [r]ights, [f]ather [r]ights etc.” Father alleged that it was in the child’s best interest for the court to dismiss his case because his son had been neglected by CFS. He also alleged that the social worker had ruined his life and his son’s life “with lies and scandals, false medical [r]eports, unsafe foster [h]omes, [d]isregard for [h]ealth, [d]ental, etc.” Father asked for pain and suffering compensation,

restitution from the social workers, and the immediate return of the child. The social worker filed a response recommending that father's petition be denied since there was no factual basis for his allegations. Moreover, the child had been placed with a prospective adoptive family that was committed to raising him to adulthood.

On April 25, 2013, mother filed a section 388 petition requesting that the child be returned to her on a family maintenance plan or, alternatively, that the court reinstate her reunification services. For changed circumstances, she alleged that she completed her substance abuse program at Central Valley on December 27, 2012, and she attached a copy of her certificate of completion. As to best interest of the child, mother alleged that she had learned to be protective and could provide a safe and loving home. The social worker filed a response recommending that mother's petition be denied since she had still not addressed other portions of her case plan, such as individual counseling to address her domestic violence issues. Furthermore, mother continued to reside with father, who had not addressed his case plan or shown any benefit from services completed. Finally, the social worker noted that the parents had failed to maintain regular visitation since the setting of the section 366.26 hearing.

At the hearing on May 6, 2013, the court first addressed the two section 388 petitions. Counsel for the child argued that the court should not grant a hearing but summarily deny both petitions. She stated that there was no evidence of changed circumstances with regard to father, and his petition only bolstered the fact that it was not in the child's best interest to grant it. Counsel added that, at a minimum, father would

have to show he engaged in counseling or mental health treatment. As to mother's petition, counsel stated that mother only attached a certificate of completion for an outpatient program. Mother's counsel responded that the completion of the program constituted a change. The court did not find a prima facie showing to hold a hearing on either petition. The court remarked that mother only had one certificate and "no other programs," and stated that that was insufficient. The court found that her petition did not state any new evidence or change of circumstances. The court stated that father's petition contained "a lot of accusations," but no evidence. Responding to the claim that the judge was racist, the court stated that it did not know or care what father's religious preference was. The court noted that both petitions were untimely, since they were to be filed by April 19, 2013. The court concluded that both petitions failed to state a change of circumstance or present any new evidence. The court denied the petitions.

The court then addressed the section 366.26 recommendation and report. Mother testified at the hearing and said at her visits with the child, they played, she brought toys, and they ate. She said the child recognized her as his mother because he said "Mom" at her last visit. She said they had a bond and at the end of visits, he did not want her to leave. Father also testified. He said he played with the child, read books, played with the train tracks, and drew. He said he had a wonderful relationship with the child. When asked about his section 388 request, father responded that "of course" he asked for the child to be returned to him because the child "[did not] deserve to be taken in the first place." The court concluded that the beneficial relationship exception did not apply, and

that both parents had just become “friendly visitors to the child.” The court terminated parental rights, found that the child was adoptable, and set adoption as the permanent plan.

ANALYSIS

I. The Court Properly Denied Mother a Hearing on Her Section 388 Petition

Mother argues that the juvenile court erred in denying her an opportunity to be heard on her section 388 petition. She claims that she established a prima facie case in alleging her recent completion of a second substance abuse program, attaching the certificate of completion, and in alleging that she was protective and now able to provide a safe and loving home. We disagree.

“A juvenile court order may be changed, modified or set aside under section 388 if the petitioner establishes by a preponderance of the evidence that (1) new evidence or changed circumstances exist and (2) the proposed change would promote the best interests of the child. [Citation.] A parent need only make a prima facie showing of these elements to trigger the right to a hearing on a section 388 petition and the petition should be liberally construed in favor of granting a hearing to consider the parent’s request. [Citation.] [¶] However, if the liberally construed allegations of the petition do not make a prima facie showing of changed circumstances and that the proposed change would promote the best interests of the child, the court need not order a hearing on the petition. [Citations.]” (*In re Zachary G.* (1999) 77 Cal.App.4th 799, 806 (*Zachary G.*))

Mother's section 388 petition sought the return of the child to her under a plan of family maintenance, or the reinstatement of her reunification services. However, the only changed circumstance that mother alleged was that she completed a substance abuse program on December 27, 2012. She completed the substance abuse program about two weeks after the court terminated her services. However, she did not complete individual counseling to address the domestic violence between her and father. Moreover, mother and father were living together as a couple, and father had not shown any benefit from his services. We also note that mother failed to maintain regular visitation since the court terminated her services, as she had only visited the child once in four months.

Given mother's failure to address all of the problems affecting her ability to parent the child safely, we conclude that the court properly found that the evidence of changed circumstances was insufficient. Moreover, mother's petition did not allege how the proposed change would promote the best interest of the child. Thus, there was no need for the court to order a hearing on the petition. (*Zachary G.*, *supra*, 77 Cal.App.4th at p. 806.)

II. The Beneficial Parental Relationship Exception Did Not Apply

Mother and father both contend that the court erred in not applying the beneficial parental relationship exception under section 366.26, subdivision (c)(1)(B)(i). We disagree.

At a section 366.26 hearing, the court determines a permanent plan of care for a dependent child. (*In re Casey D.* (1999) 70 Cal.App.4th 38, 50.) Adoption is the

permanent plan preferred by the Legislature. (*In re Celine R.* (2003) 31 Cal.4th 45, 53.)

If the court finds that a child may not be returned to his or her parents and is likely to be adopted, it must select adoption as the permanent plan, unless it finds a compelling reason for determining that termination of parental rights would be detrimental to the child under one of the exceptions set forth in section 366.26, subdivision (c)(1)(B). One such exception is the beneficial parental relationship exception set forth in section 366.26, subdivision (c)(1)(B)(i). (See *In re Jerome D.* (2000) 84 Cal.App.4th 1200, 1206.) This exception applies when the parents “have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship.” (§ 366.26, subd. (c)(1)(B)(i).) The phrase “benefit from continuing the relationship” refers to a parent/child relationship that “promotes the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents. In other words, the court balances the strength and quality of the natural parent/child relationship in a tenuous placement against the security and the sense of belonging a new family would confer. If severing the natural parent/child relationship would deprive the child of a substantial, positive emotional attachment such that the child would be greatly harmed, the preference for adoption is overcome and the natural parent’s rights are not terminated.” (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 575 (*Autumn H.*)) It is the parent’s burden to show that the beneficial parental relationship exception applies. (*In re Lorenzo C.* (1997) 54 Cal.App.4th 1330, 1345.)

Mother asserts that she maintained regular visitation and that her interaction with the child was appropriate. She claims that her regular contact with the child, and her “loving and evident bond” with him “mandate[d] a refrain from termination of parental rights.” Mother states that she brought snacks, toys, books, and gifts for the child, that she brushed his teeth, read with him, fed him, and talked and laughed with him. She also allowed him to explore, was attentive to his needs, and “seemed to know what to do in order to console him.” She points to her testimony at the section 366.26 hearing that she and the child had a bond, and that he recognized her as his mother, and “actually called her ‘Mom’ on her most recent visit.”

Mother cites *In re Brandon C.* (1999) 71 Cal.App.4th 1530 (*Brandon C.*) in support of her position. However, that case is distinguishable. In that case, the Los Angeles County Department of Children and Family Services failed to provide information to the court about the quality of the visits between the mother and her children. Rather, the reports simply described “the regularity of the visits, with no evaluation of their success.” (*Id.* at p. 1538.) Thus, the only evidence before the juvenile court concerning the mother’s relationship with her children was the testimonies of the mother and the paternal grandmother that there was a close bond, and that a continuation of contact would be beneficial to the children. (*Id.* at p. 1537.) The appellate court affirmed the juvenile court’s finding that the beneficial parental relationship exception applied. (*Id.* at p. 1538.)

In contrast, the social worker here provided information regarding the quality of the visit and mother's relationship with the child. She testified that she did not sense a bond between mother and the child, and that the child did not seem to respond to mother any differently than he did to the caregiver or the social worker. Although mother had been overall consistent with visitation, the child viewed her as somebody who was taking care of him or playing with him. The social worker did not see the child seek comfort from mother, ask her to pick him up, or be affectionate with her. Although mother's interactions with the child during her visits may have been appropriate, they, at best, "amounted to little more than playdates for him with a loving adult." (*In re Bailey J.* (2010) 189 Cal.App.4th 1308, 1316.) Moreover, the evidence indicated that visits with mother had a negative effect on the child. The foster parent reported that after visits with mother, the child tended to engage in violent behavior. The child became irritable immediately after the visits and had trouble sleeping at night. He would wake up several times at night screaming.

As to father, he also claims that his interactions were appropriate and that he "steadily improved parenting skills and the quality of his visits." However, the record shows otherwise. The social worker reported that father failed to demonstrate adequate knowledge of age-appropriate behavior or proper methods of bonding with the child. When the child showed interest in a toy, father would "bombard" him and not allow him to explore the toy on his own. The child would then get frustrated and scream, yell, hit and/or kick father. At one point, the social worker requested the court to make a finding

that visits with father were detrimental. There was no reason for the court to find that father's relationship was beneficial to the child. The child had suffered severe injuries while in father's care, and father never acknowledged any responsibility for those injuries. By the time of the section 366.26 proceeding, father *still* thought the child never should have been removed from his custody.

The parents' interactions with the child do not even begin to demonstrate that their relationships with him promoted his well-being "to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents." (*Autumn H.*, *supra*, 27 Cal.App.4th at p. 575.) Neither mother nor father has proffered any evidence to support a finding that the child had a "substantial, positive emotional attachment such that [he] would be greatly harmed" if the relationship was severed. (*Ibid.*)

We further note that, in contrast, the evidence showed that the child and his prospective adoptive mother had a very strong attachment. The child was happy and well cared for; the prospective adoptive mother loved him, and she wanted to provide a permanent home for him. She was dedicated to him and committed to raising him to adulthood.

In light of all of this evidence, we conclude that the beneficial parental relationship exception under section 366.26, subdivision (c)(1)(B)(i), did not apply here.

DISPOSITION

The court's orders are affirmed.

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HOLLENHORST
Acting P. J.

We concur:

KING
J.

MILLER
J.